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IN THE

# Supreme Court of the United States

October Term, 1995

**LAWTON M. CHILES, JR., et al.,**

*Petitioners,*

**vs.**

**UNITED STATES OF AMERICA, et al.,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT


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## QUESTIONS PRESENTED FOR REVIEW

The complaint of the State of Florida and other petitioners seeks a declaratory judgment as to legal rights and obligations and either injunctive or restitutionary relief from costs imposed on them by national policies that have allowed the influx of huge and disproportionate numbers of illegal aliens into a small minority of states. The District Court found that Florida's "tremendous financial burden" was attributable to national policies and that there was no realistic prospect of relief through the national political process, but nevertheless dismissed the complaint. The Court of Appeals affirmed.

The Questions Presented are:

**1.** Whether the respondent officials of the national government violate Article IV, § 4 and the Tenth Amendment when they pursue policies that permit exorbitant numbers of illegal aliens to enter a tiny minority of states, and fail to make equitable restitution of the huge and disproportionate costs thereby imposed on those states and their political subdivisions.

**2.** Whether a claim that the Attorney General and other officials of the national government have violated the immigration laws by adopting and pursuing a general policy that is so extreme as to amount to an abdication of statutory responsibilities presents a question committed to agency discretion by law.

## PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs and appellants in the court below):

Lawton M. Chiles, Jr., Governor of Florida; the State of Florida; the Dade County Public Health Trust Division, an agency and instrumentality of Dade County, a political subdivision of the State of Florida; the School Board of Dade County, Florida.

Respondents (Defendants and appellees in the court below):

The United States of America; Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service ("INS"); Jennifer Nelson, Acting Regional Administrator of the Southern Regional Office of the INS; Walter D. Cadman, District Director of the Miami District Office of the INS; Donna E. Shalala, Secretary, United States Department of Health and Human Services.

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is set forth in Appendix A and is reported at 69 F.3d 1094.

The decision of the United States District Court of the Southern District of Florida is set forth in Appendix B and is reported at 874 F. Supp 1334.

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 8, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Article IV, United States Constitution; Tenth Amendment, United States Constitution; and 8 U.S.C. § 1103(a). These provisions are set forth in Appendix C.

## STATEMENT OF THE CASE

### 1. Nature of the Controversy

The national government possesses exclusive and plenary power over immigration. The sources of this power include not only the Naturalization Clause, but also, *inter alia*, the Commerce Clause, the war power, and the Guarantee

Clause.[1] This exclusive national power over immigration prevents the states from excluding or deporting undocumented aliens, regardless of the costs imposed. *See Plyler v. Doe,* 457 U.S. 202, 242 n.1 (1982) (dissenting opinion of Burger, C.J.); *see generally Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876). Acting under its exclusive power, Congress has enacted a comprehensive statutory scheme regulating immigration. One statute, 8 U.S.C. § 1103, provides that the Attorney General ". . . *shall* have the power and *duty* to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ."

Over the years, federal officials have acknowledged the failure of national policies to respond effectively to a swelling tide of illegal immigration. In 1981, Attorney General William French Smith confessed that the United States had lost control of its borders. (App. D-14, par. 41) At about the same time, the United States conceded in litigation that the onslaught of undocumented aliens constituted an invasion of the state of Florida within the meaning of Article IV, § 4. *See Louis v. Nelson*, 544 F.Supp. 973, 975 (S.D. Fla. 1982). Despite sporadic promises of corrective action, Florida continues to be overwhelmed with undocumented aliens.

Illegal immigration imposes enormous costs on certain state governments and their subdivisions. Those costs are not distributed proportionately. The population of illegal immigrants is overwhelmingly concentrated in just seven states.[2] Those seven states incur exorbitant costs, while the

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[1]Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. Rev. 1597, 1608–09 (1995) (citing cases).

[2]*See* Clark, Passel, Zimmerman & Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994) (hereinafter cited as "*Urban Institute Report I*"). Table 1.1 at p.5 demonstrates that 86% of undocumented aliens live in Florida, California, New York, Texas, Illinois, New Jersey, and Arizona.

other 43 pay little or nothing. Furthermore, the national government actually collects an estimated $3.37 billion per year in taxes paid by undocumented aliens.[3]

The theory of this suit is that respondent officials have breached statutory and constitutional obligations to safeguard the borders of the United States; that by abdicating their enforcement responsibilities, they have effectively commandeered the seven impacted states and their local governments to deal with a problem arising within the exclusive power of the national government; and that they have thereby compromised the political integrity of the most disproportionately burdened states in violation of basic principles of constitutional federalism, Article IV, § 4, and the Tenth Amendment. This theory echoes the position taken by five Justices of this Court in *Plyler v. Doe*, *supra*, which held that the states are constitutionally obliged to provide free public education to illegal alien children:

> It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. *If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burden of their presence here.*[4]

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[3]Passel, *Immigrants and Taxes: A Reappraisal of Huddle's "The Cost of Immigrants"* (1994) (hereinafter cited as "*Urban Institute Report II*"), Table 8.

[4]457 U.S. at 242 n.1 (Burger, C.J., dissenting) (emphasis added). Chief Justice Burger's opinion was joined by Justices White, Rehnquist, and O'Connor.

(continued...)

## 2. Summary of Facts

As a result of the national government's massive and persistent failure to enforce the immigration laws, there are an estimated 3.4 million undocumented aliens in the United States.[5] Their presence here reflects an obvious failure of national policy to maintain the security of the nation's borders.[6] Effective deportation proceedings are rare. Other efforts to implement statutory immigration policies are similarly minimal. For example, despite Congress' intent to make "the threat of sanctions against employers who hire illegal aliens . . . the cornerstone of the Immigration Reform and Control Act of 1986," enforcement actions against employers have been "virtually nonexistent." Note, *supra,* n.5, at 1644.

The Immigration and Naturalization Service estimates that at least 345,000 illegal aliens currently reside in Florida. (App. D-15, par. 42) Petitioners believe, and have alleged, that the number is actually much higher and will continue to grow in view of the unsettled political climate in the Caribbean and the accommodating policies of the United States Government. (App. D-15, par. 42)

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(...continued)
Justice Powell also acknowledged that economic burdens imposed by illegal immigration should be shared by the national government. *Id.* at 240–41.

[5]*Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 Harv. L. Rev. 1643, 1645 n. 8 (citing an estimate by the General Accounting Office) (hereinafter, "Note").

[6]*See, e.g., Administration's Proposals on Immigration and Refugee Policy, 1981: Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess., at 6 (1981) (statement of William French Smith, Attorney General of the United States) ("We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively.").

Illegal immigration into Florida has caused repeated crises: overburdened school systems, increased crime, and heightened demand for costly emergency medical care. Florida has estimated its annual expenditures for undocumented aliens are at least $884 million per year.[7] (App. D-5, par. 11) But *Urban Institute Report I, supra, n. 2*, determined that Florida's actual outlays for education, emergency medical services, and incarceration were much *higher* than the state's estimates. (*Id.*, pp. 56, 89, 128) That study concludes, for example, that Florida's educational expenditures on behalf of undocumented aliens amounted to $424 million for 1993–94 alone. (*Id.*, p. 11) The burdens at the local level are also immense. Petitioner Dade County School Board expended about $1 billion in providing education to aliens from 1989–1994. (App. D-24, par. 55)[8] Petitioner Dade County Public Health Trust estimates it expended at least $102 million to provide medical care for undocumented aliens during the three-year period 1990–93. (App. D-24, par. 55)

While illegal immigration imposes immense financial burdens on Florida and its political subdivisions, *Urban Institute Report II, supra*, n. 3 — a study commissioned for the Department of Justice and United States Office of Management and Budget — establishes that the national government actually makes money by reason of its non-enforcement of the immigration laws. The report found that the United States annually collects $3.37 billion in taxes from undocumented aliens. Since Florida has an estimated 9.529% of the nation's

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[7]Florida's study, *The Unfair Burden: Immigration's Impact on Florida* (1994), was prepared by the Executive Office of the Governor and the Florida Advisory Council on Intergovernmental Relations. This report was appended to the complaint as Exhibit A. A copy has been lodged with this Court.

[8]The county's records do not distinguish between expenditures on legal and undocumented alien school children, because *Plyler v. Doe* requires it equally to provide free public education to both.

undocumented aliens, it could be reasonably calculated that undocumented aliens living in Florida annually generate over $355 million in revenues to the national government. By contrast, the national government reports annual budget expenditures for *all* enforcement of the immigration laws of only a fraction of the amount the United States itself receives from undocumented aliens.[9] Noting that the United States Government actually profits from its plight, Florida has made repeated pleas for help to both Congress and the Executive Branch. As expressly recognized by the District Court, those pleas have proved unavailing. (App. B-23.)

### 3. Proceedings Below

#### A. Florida's Complaint

On April 11, 1994, petitioners filed suit against respondents in federal District Court. The complaint, set forth in Appendix D, alleged that respondents' policies, actions, and inactions violated both constitutional and statutory duties to protect Florida and its political subdivisions against an unabated onslaught of illegal immigration — once characterized by the national government itself as an invasion — that imposes enormous economic and political costs and destroys lines of political accountability within the state.

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[9]The Budget of the United States Government, attached as an Appendix to respondents' brief to the Court of Appeals, shows total expenditures for these purposes of $1.625 billion in 1994, $1.785 billion (est.) in 1995, and $2.252 billion (est.) in 1996 (at 646,647). Respondents' brief to the Court of Appeals trumpeted "total Federal government costs relating to the Haitian crisis during 1992 and 1993 exceeding $200 million," a small fraction of Florida's costs devolving from the national government's failure to stem illegal immigration.

### (i) The Constitutional Claim

Petitioners' principal constitutional claims were framed by Count IV of the complaint. (App. D-36) Based directly on Article IV, § 4 (the Guarantee and Invasion Clauses) and the Tenth Amendment, Count IV alleged that respondents' policies had permitted a deluge of illegal immigration, against which Florida is constitutionally barred from protecting itself, that constitutes an "invasion" within the meaning of Article IV, § 4, and otherwise reflects a breach of duty owed to the states under basic principles of constitutional structure and the Tenth Amendment. Count IV further alleged that, because petitioners have no practical or constitutional alternative but to absorb these huge costs attributable to the national policy of accommodating illegal immigration into the state, respondents' policies have fundamentally impaired Florida's sovereign rights and interests in violation of the Guarantee Clause and the Tenth Amendment, as construed by this Court in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992). By effectively coercing Florida to bear the costs of national immigration policy, the national government has conscripted both the State's resources and its legislative processes, while obscuring lines of political accountability.

### (ii) The Statutory Claim

Count II of the complaint was brought under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706, and sought relief from respondents' arbitrary and capricious failure to perform duties imposed by the immigration laws. (App. D-30) The plainest of the relevant statutes, 8 U.S.C. § 1103, provides specifically that it *"shall"* be the "*duty*" of the Attorney General to take necessary action to "control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ." (Emphasis added.) The complaint alleged that respondents' enforcement policies

amounted to an abdication and default of statutory duty and thus were actionable under Section 702, which authorizes actions against officials who "fail to act in an official capacity," and under Section 706, which authorizes the courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "set aside" agency action and inaction that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10]

### (iii) Relief Sought

With respect to both their constitutional and statutory claims, petitioners requested (i) a declaratory judgment and (ii) an injunction directing respondents *either* to alter their substantive policies involving illegal immigration in such a way as to satisfy constitutional and statutory obligations *or*, alternatively, to make equitable restitution of the amounts that petitioners are effectively required to spend as a result of respondents' default.

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[10]The complaint filed in the District Court included two additional counts. Count I sought declaratory and injunctive relief ordering the Attorney General to adopt and issue regulations implementing a federal statute providing for limited reimbursement of states — not to exceed $35 million annually — for costs of meeting "immigration emergencies." *See* 8 U.S.C. § 1101, as amended by Pub.L. 99-603, Pub.L. 101-649, and Pub.L. 102-140. This statute remained inoperative for lack of implementing regulations for seven years. After institution of this action, regulations were issued, mooting this Count.

Count III asserted constitutional claims, pressed in the Court of Appeals but not presented to this Court, that statutory limitations on the Medicaid and AFDC programs — which disproportionately deny Florida and a handful of other states reimbursement for expenditures on needy residents because a relatively large number of those residents are undocumented aliens — unconstitutionally discriminate against the state in violation of the Spending Clause (Article 1, § 8, cl. 1 of the Constitution) and other constitutional provisions guaranteeing equality among the states. The District Court found that Count III presented a nonjusticiable political question. The Court of Appeals affirmed (App. A) .

Petitioners do *not* seek review in this Court of the questions presented by Counts I and III of their complaint.

(App. D-39) The complaint acknowledged that "a broad scale injunction commanding the defendants to protect Florida's borders from an invasion of aliens might raise troubling issues of judicial power." (App. D-39) It asserted, however, that "no such issue would be raised by a mandatory injunction compelling the provision of ongoing restitution as an alternative remedy until such time as defendants bring their enforcement policies into compliance with applicable law." (App. D-39) The complaint made clear that restitution would depend on proof by petitioners that they had expended specific sums on behalf of undocumented aliens and that the expenditures were for basic and unavoidable services necessary for the preservation of public health, safety, and welfare — most notably education (which petitioners are required to provide under *Plyler v. Doe*), essential medical care, and criminal incarceration.[11]

### (iv) Basis for Jurisdiction in the District Court

Petitioners invoked the jurisdiction of the District Court pursuant to 5 U.S.C. § 702, *et. seq.*, 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202. (App. D-2)

## B. The Ruling of the District Court

The District Court dismissed the complaint. The court's order recognized that Florida is "subject to a tremendous

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[11]After Florida filed its complaint, California, Arizona, Texas, New York and New Jersey filed suits in federal courts. The lower court rulings in these cases, relying *inter alia* on the District Court's decision in this case *(Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994), granted the government's motions to dismiss. All of these decisions have been appealed. *See California v. United States, appeal pending* No. 9 5-55490 (9th Cir.); *Arizona v. United States*, appeal pending, No. 95-15980 (9th Cir.); *Padavan v. United States, appeal pending*, No. 95-6156 (2d Cir.); *Texas v. United States, appeal pending*, No. 95-40721 (5th Cir.); *New Jersey v. United States, appeal pending*, No. 95-5685 (3d Cir.).

financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws." (App. B-23) The court also acknowledged that petitioners' costly efforts to meet that burden did not result from a "choice" in any meaningful sense but was the result of a practical compulsion:

> [A]ny choice Florida has is, in essence, a Hobson's choice. The State of Florida is presented with the following dilemma: If Florida chooses not to provide services to illegal aliens including closing schools, emergency rooms, etc., the impact on the health, safety and welfare of its citizenry could be potentially devastating. If, on the other hand, Florida chooses to provide the services, the cost of these services could cripple the State of Florida.

(App. B-21, n.19) In addition, the District Court found virtually no prospect that the national political process would relieve the burden that Florida "is being unfairly forced to bear." (App. B-23)

Nevertheless, the District Court ruled that the complaint failed to state a claim on which relief could be granted. The court found petitioners' constitutional claims asserted in Count IV to be barred by the political question doctrine, because it could not identify judicially manageable standards by which to determine when illegal immigration and its associated costs invaded the state's sovereignty. It also ruled as a matter of law that Florida suffered no coercion in violation of the Tenth Amendment, because Congress had not enacted legislation mandating state action: "In the instant case, Congress has adopted the policies themselves and did not order any action on the part of the states." (App. B-21) As to the statutory claims

of Count II, the District Court held that enforcement of the immigration laws was committed to agency discretion by law, and thus unreviewable, notwithstanding the allegation that Attorneys General past and present had abdicated statutory duties.

### C. The Ruling of the Court of Appeals

On expedited review, the Eleventh Circuit Court of Appeals affirmed. Agreeing with the District Court, it ruled that Count IV, insofar as it was based on the Guarantee and Invasion Clauses, presented a nonjusticiable political question. (App. A-4) The Court of Appeals also found as a matter of law that Florida's burdens were "not the product of federal coercion of the kind which violates the Tenth Amendment." (App. A-5) The Court of Appeals upheld dismissal of the Count II statutory claims on the ground that enforcement or nonenforcement of the immigration laws was committed to the Attorney General's unreviewable discretion. (App. A-3)

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE HAS PROFOUND IMPLICATIONS FOR THE ALLOCATION OF POWERS AND THE STRUCTURE OF CONSTITUTIONAL FEDERALISM.

The importance of the issues presented by this case is self-evident. By its own admission, the national government has lost control of the nation's borders. Some 15 years ago, the government recognized that the result was tantamount to an invasion of the state of Florida. *See Louis v. Nelson*, *supra.* Yet respondents' efforts to protect the state against illegal immigration and its attendant burdens are as flaccid and porous today as they were a decade ago. Respondents' sole defense, throughout this lawsuit, has been that their policies, actions,

and inactions are immune from legal challenge. With respect to the constitutional allocation of powers, this case thus presents clear legal questions of foremost importance: whether constitutional and statutory provisions charging the national government to secure the states against "invasion" and to guarantee the integrity of their political processes, and imposing a duty to "control and guard the boundaries and borders of the United States against the illegal entry of aliens," mean what they say and, if so, whether they are judicially enforceable.

The implications of the case for constitutional federalism are, if anything, even more urgent. Florida is one of seven states forced to absorb the overwhelming costs of failed national immigration policy. As a consequence of the national government's virtual abdication of constitutional and statutory responsibilities, there are hundreds of thousands of illegal immigrants living within the state; illegal immigration into the state continues unabated; and the economic costs to the state are both staggering and, for all practical purposes, inescapable. In the starkest practical terms, this case presents the question whether officials of the national government can impress a few states to bear such huge, disproportionate, and wholly inequitable financial costs. In terms of constitutional structure, the question is whether officials of the national government may so distinctively coerce a small minority of states, dominate their legislative agendas, and transfer political accountability for state policies enacted in response to *de facto* national compulsion.

The practical importance of the legal issues in this case is heightened by the absence of political mechanisms or incentives by which the underlying legal and constitutional deficiencies might be righted. Because illegal immigration brings net benefits to the federal treasury of roughly $3.37 billion annually, there is little or no financial incentive for the

national government to discharge its responsibilities concerning illegal immigration. Indeed, it is telling that the national government, by its own account, spends per year far less than the undocumented aliens pay it in its pathetically inadequate efforts to check illegal immigration. In short, the national government is a net beneficiary of illegal immigration; a small minority of states bear the crushing financial burden; and the other 43 or 44 states have every political incentive to let that minority of states absorb the costs of national policy.[12] The situation speaks for itself: this Court is the only forum in which the vital questions of constitutional structure presented by this case can be addressed. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [this Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

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[12]That illegal immigrants produce a net financial gain for the national government and that the costs attributable to them for education, medical services, and incarceration far exceed state and local revenues generated from them in the seven most affected states does not seem open to serious question. *See, e.g.*, Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. Rev. 1509, 1539 & n.126 (1995) (citing Fix & Passel, *Immigration and Immigrants: Setting the Record Straight* 6 (1994)); Legomsky, *Immigration, Federalism and the Welfare State*, 42 UCLA L. Rev. 1453, 1470 (1995) (citing *Urban Institute Report I*, chs. 3-5).

## II. WHETHER OFFICIALS OF THE NATIONAL GOVERNMENT ARE CONSTITUTIONALLY OBLIGED TO PROTECT THE STATES AGAINST A DE FACTO INVASION OF UNDOCUMENTED ALIENS AND TO PRESERVE THE INTEGRITY OF THE STATES' POLITICAL PROCESSES, WHEN THE STATES ARE CONSTITUTIONALLY BARRED FROM DOING SO, IS AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

In light of both the magnitude of the stakes and the fundamentality of the underlying principles, questions concerning respondents' obligations deserve review by this Court.

### A. Contrary To The Conclusion Of The Court Of Appeals, The National Government And Its Officials Are Constitutionally Obliged To Secure The States Against Invasion And Otherwise Protect The Integrity Of Their Political Processes From Gross And Disproportionate Burdens Imposed By Illegal Immigration.

Article IV, § 4 includes two clauses, the Guarantee Clause and the Invasion Clause, both of which speak in mandatory terms and impose duties, running to the states, on the national government: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." The Guarantee Clause requires the national government to preserve the state autonomy necessary to foster republican government, and it forbids interference by the national government that could destroy a state's republican character. Shapiro, *Federalism: A Dialogue* 111 (1995); Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88

Colum. L. Rev. 1, 25 (1988).[13] In essence, the Clause ensures each state a form of government that is accountable and therefore responsive to the will of its citizens. The Invasion Clause imposes on the national government the additional affirmative duty to protect the states against foreign invasions, including those of undocumented aliens whom states may neither exclude nor deport.

Both Clauses, as this case illustrates, are crucial supports of the federalism contemplated by the Constitution:

> [The] federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experiment in government; and it makes government more responsive . . . .

*Gregory v. Ashcroft*, *supra*, 501 U.S. at 458. All of the "numerous advantages" of constitutional federalism depend on the national government's respecting and maintaining the political integrity of the states.

Predictably, and contrary to its own argument in *Louis v. Nelson*, the national government asserts that the Invasion Clause applies only to military invasions. But the dual guarantees of a republican form of government and protection against invasion must be read purposively and conjunctively. Large and continuous influxes of undocumented aliens have

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[13]Professor Merritt's article is cited numerous times in *New York v. United States* and *Gregory v. Ashcroft*. *See New York*, *supra*, 112 S. Ct. at 2408, 2418, 2424, 2433 and *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

placed severe burdens on Florida's educational, correctional, health care, and other systems; distorted the agenda of state and local legislative bodies; and thus blurred the lines of political accountability that a republican form of government requires. Respondents' effort to confine the scope of the Invasion Clause was rejected over a century ago in *The Chinese Exclusion Case*, 130 U.S. 581, 605–06 (1889) ("It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us"). *See also,* Shapiro, *supra*, at 111. The commands of Article IV, § 4 thus speak directly to the facts of this case.

Even apart from claims arising under Article IV, § 4, the Court of Appeals erred by failing to recognize that respondents owe duties to petitioners under basic principles of constitutional structure that apply when exclusive federal power precludes a state from acting to protect itself. Among the most crucial facts about this case is that petitioners are constitutionally precluded from defending themselves against illegal immigration and its attendant burdens. Florida is not constitutionally permitted to police its own borders, nor can it deport illegal immigrants who have settled there. *See, e.g., Henderson v. Mayor of the City of New York*, *supra*; *Plyler v. Doe*, *supra*, 457 U.S. at 242, n.1 (dissenting opinion of Burger, C.J.). Even state efforts to assist the national government's transparently ineffectual enforcement policy might well be preempted by federal laws. *See League of United Latin American Citizens v. Wilson*, 1995 WL 699583 (C.D. Calif. 1995) (holding important elements of California's Proposition 187 preempted by federal immigration law); *see generally Hines v. Davidowitz*, 312 U.S. 52 (1941) (finding federal preemption of state regulatory efforts by parallel provisions of federal immigration law) .

In a lengthening series of decisions, most recently including *United States v. Lopez*, *supra*, this Court has recognized that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, *supra*, 501 U.S. at 457, under which the Federal Government, in the exercise of its constitutional powers, must respect the sovereign integrity of the states and their political processes. "'[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.'" *Id.*, citing *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane v.Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

This is a case, by no means unprecedented under the decisions of this Court, in which "the preservation of the States" as sovereign and independent political units—with their resources secure against impressment and their political agenda undistorted by the *de facto* coercion of outsiders — requires protective action by the national government. Although this Court has hesitated to read the Constitution as imposing affirmative, judicially enforceable obligations to render aid or enforce the law, *see, e.g., DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189 (1989), there are well-recognized exceptions. One important category involves cases in which the government has disabled individuals from protecting themselves and, in consequence, has assumed an obligation to provide specific protections. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized — and wholly dependent on the State — it is conceded by petitioners that a duty to provide certain services and care does exist . . . ."); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244–45 (1983) (holding that the Due Process Clause requires "the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police").

Because the exclusivity of federal power renders Florida and its political subdivisions impotent to protect themselves against illegal immigration, theirs is an analogous situation. *Cf. Collins v. Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 1069 (1992) (noting decisions premised on the theory that "the State owes a duty to take care of those who have been deprived of their liberty"). This Court should grant certiorari in this case to determine authoritatively whether the national government, having foreclosed state action, has assumed an obligation to provide minimally adequate protection against, or in the alternative to make equitable restitution of the costs imposed on Florida by, the huge and disproportionate onslaught of undocumented aliens.[14]

### B. The Court Of Appeals Erred In Finding Petitioners' Claim Under The Guarantee Clause To Be Nonjusticiable.

The Court of Appeals erred in ruling that petitioners' claims under the Guarantee Clause, and possibly under the Invasion Clause as well, present nonjusticiable political questions. As *New York v. United States* expressly recognized, the decisions of this Court "suggest[] that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 112 S. Ct. at 2433. Justice O'Connor, writing for the Court in *New York*, also cited academic

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[14]On the facts of this case, there is no need for this Court to survey the precise line of demarcation beyond which illegal immigration becomes an invasion, the integrity of Florida's political process is impaired, or the enforcement policies of the national government can be deemed constitutionally deficient. Wherever the line might reasonably be drawn, the facts alleged show that the national government has crossed it. To resolve this case, it is enough to identify the controlling principles and hold what the facts show indisputably: that respondents' non-enforcement policies, coupled with their failure to make restitution of the costs that those policies have imposed, have violated the Constitution.

commentary asserting "that courts should address the merits of such claims, at least in some circumstances." Indeed, in *New York*, this Court assumed *arguendo* that the state's Guarantee Clause claims were indeed justiciable and addressed them, albeit rejecting them on the merits. *See id.* at 2432–33.

This Court's willingness to reach the merits of the Guarantee Clause claim in *New York* tracks an important distinction, long implicit in the case law, that points to the justiciability of the Guarantee Clause issue presented in this case. A claim brought by citizens under the Guarantee Clause to challenge the structure of government adopted within a state typically presents nonjusticiable political questions. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581 (1849). By contrast, a claim *by* a state or its elected representatives challenging outside coercion directed *against* the state and its political processes is and must be justiciable. *See, e.g., Coyle v. Oklahoma*, 221 U.S. 559 (1911); Merritt, *supra*, at 73–75. Sound policy supports this distinction. In cases involving coercion directed against the state by the national government, the national political process *patently* cannot be trusted to vindicate the principles underlying the Guarantee Clause. In such cases, including this one, judicial review is necessary to ensure that the Guarantee Clause does not become a constitutional dead letter.

This Court should grant the writ in this case both to protect the vitality of the Guarantee Clause and to clarify the principles differentiating those Guarantee Clause claims that are justiciable from those that are not.

## III. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE THEORY OF FEDERALISM IMPLICIT IN THE CONSTITUTION AND IN DECISIONS OF THIS COURT, ESPECIALLY *NEW YORK v. UNITED STATES*.

Respondents' failure to make equitable restitution of the costs exacted by undocumented aliens' presence within the state has the practical effect of commandeering the state's political process to deal with the burdens that undocumented aliens impose.

*New York v. United States* specifically articulated the principles that ought to control this case. At issue in *New York* was a congressional statute requiring that states either enact legislation providing for the disposal of nuclear waste or take title to waste produced within their borders. This Court held that the statute offended the Tenth Amendment on two closely related grounds.

First, the challenged statute "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce'" a national program. 112 S. Ct. at 2420. Such commandeering, this Court reasoned, deprived the states of their constitutional role as distinct and independent sovereigns. The national government, the Court held, "may not conscript state governments as its agents." *Id.* at 2429.

The Court of Appeals erred in failing to apply that rationale to this case. The veritable "invasion" of undocumented aliens to which Florida is subject — as the District Court expressly recognized — has confronted petitioners with a practical necessity of legislating to provide costly services to them. The failure of federal enforcement policy produces a legal compulsion for the state to provide education to illegal immigrants under *Plyler v. Doe;* and in other cases the state's choice whether to act or not to act, to use

the District Court's terminology, is a Hobson's choice (App. B-21, n.19) — which, of course, is to say that it is no choice at all. In short, the national government's accommodation of illegal immigration, coupled with its failure to assume the states' financial costs in meeting the ensuing burdens, has produced a *de facto* compulsion of state legislative action comparable to that which *New York* condemns.

It is crucially significant that in this case, as in *New York*, the coercive pressure exerted by national policy is experienced uniquely by the states and their political subdivisions. What distinguished *New York* was that the practical compulsion to legislate arose from congressional action that was directly targeted at states *as* states. *See* 112 S. Ct. at 2420. This case is relevantly similar: the coercive pressure to provide services to undocumented aliens is a pressure that can *only* be felt by states and their political subdivisions.

A second basis for the decision in *New York* also applies to this case. *New York* reasoned that to allow the national government to impose *de facto* obligations to legislate regarding nuclear waste disposal would leave citizens uncertain where responsibility for the location of waste disposal sites lay — with Congress, which effectively coerced the states into legislating, or with state officials, who would have made the ultimate legislative decision, but would have done so only in response to congressional coercion. "Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 112 S. Ct. at 2424.

The national government's failure to stem the flood of illegal immigration in this case, coupled with its failure to fund state expenditures necessitated by that flood, has an

accountability-diminishing effect that is even more acute than that at issue in *New York*. Compelled expenditures for the benefit of non-citizens, amounting to hundreds of millions of dollars annually, predictably tend to create a backlash of resentment directed at the *state*. California, a state suffering a similar immigration invasion, recently enacted a ballot initiative aimed, *inter alia*, at depriving illegal immigrants of vital public services — including the education mandated by *Plyler v. Doe*.[15] Florida, so far, has taken a different approach, acknowledging that it would be incompatible with this state's sovereign responsibilities and its own long-term interests to deny basic necessities to — and thus risk driving into crime and violence — a population that it cannot exclude and cannot eject. But what is constitutionally significant is that all political determinations made under such circumstances involve blurred lines of political accountability. As in *New York*, "federalism is hardly being advanced." 112 S. Ct. at 2432. *See also* Shapiro, *supra*, at 111–12. This Court should grant the writ in this case to clarify the principles of federalism reflected in the Constitution and in *New York* and to apply those principles in a case of great practical importance.

## IV. THIS CASE PRESENTS IMPORTANT QUESTIONS, LEFT UNRESOLVED BY THIS COURT'S DECISIONS, ABOUT THE AVAILABILITY OF JUDICIAL RELIEF TO PROTECT THE INTEGRITY OF THE STATES WHEN THE POLITICAL SAFEGUARDS OF FEDERALISM ARE DEMONSTRABLY INADEQUATE.

Because the enormous costs of respondents' policies are thrust disproportionately onto only a few states, those states are

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[15]Most, though not all, of the provisions of Proposition 187 have been held unconstitutional by a federal district court. *See League of United Latin American Citizens v. Wilson*, *supra*.

unable to protect themselves in the national political process. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), specifically anticipated that judicial enforcement of federalism values might sometimes be necessary under principles "tailored to compensate for possible failings in the national political process rather than to dictate 'a sacred province of state autonomy.'" *Id.* at 554.

This is a case in which "failings in the national political process" are self-evident, easily explicable, and predictably ineradicable by political means. *See* Note, *supra,* at 1646–48. Clearly, not every loss that a state may suffer can be ascribed to process failure. In order to be judicially manageable, the test for identification of failure of the political process must rely on the presence of structural factors — such as those in *Baker v. Carr*, 369 U.S. 186 (1962) — that make it virtually impossible for normal political bargaining to occur or for process failures to be self-correcting over time. This case would satisfy any such standard. Political discussion begins from a starting point in which six or seven states have *already* been impressed to serve the interests of the majority of the states, and the benefitted majority have no political incentive whatsoever to alleviate the minority's inequitable burden.

This Court should grant the writ of certiorari in this case to vindicate and clarify the principles reflected in *Garcia*: basic principles of constitutional federalism require judicial protection of the integrity of the states and their political processes in cases involving plain and predictable "failings in the national political process" that, for structural reasons, are unlikely to be self-correcting over time.

## V. THIS CASE PRESENTS IMPORTANT QUESTIONS ABOUT THE EXISTENCE OF DUTIES UNDER THE NATIONAL IMMIGRATION LAWS AND THE RIGHT TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT AND ABOUT THIS COURT'S DECISION IN *HECKLER v. CHANEY.*

Under 5 U.S.C. § 706, it is the duty of the federal courts to review agency action and inaction and to set aside agency policies that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Failure to take enforcement action is in principle subject to judicial review. *See id.* ("The reviewing court shall ... (1) compel agency action unlawfully withheld or unreasonably delayed."). In this case, it is indisputable that petitioners' complaint states a claim within the plain language of § 706: respondents' policy of abdication and default with respect to enforcement of the immigration laws is arbitrary, capricious, and contrary to law.

In holding that petitioners failed to state a claim on which relief could be granted, the Court of Appeals relied on 5 U.S.C. § 701, another provision of the Administrative Procedure Act, which creates an exception to reviewability for cases in which "agency action is committed to agency discretion by law." (App. A-3) That holding was error, which this Court should correct.

It is well settled by decisions of this Court that action going beyond the bounds of legal discretion — even where some scope for the exercise of discretion exists — is not committed to agency discretion by law. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In this case, petitioners explicitly pleaded that the Attorney General and her co-defendants have exceeded the bounds of any statutorily conferred discretion and failed to meet the *duty* imposed, *inter alia*, by 8 U.S.C. § 1103. In upholding dis-

missal, the Court of Appeals apparently relied on this Court's determination in *Heckler v. Chaney*, 470 U.S. 821 (1985), that *non*enforcement decisions of administrative agencies are "presumptively unreviewable." 470 U.S. at 832.[16] But *Heckler*, while creating a presumption denying reviewability in relatively fact-specific cases of nonenforcement, pointedly stated that the Court did not confront "a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833, n.4.

In this case, the adoption of "'a general policy' that is so extreme as to amount to an abdication of . . . statutory responsibilities" is *precisely* what petitioners have alleged. And the question left open in *Heckler* — whether the presumption of nonreviewability applies in such a case — is crucial. For if the inapplicability of the presumption of unreviewability is recognized in cases involving "abdication of . . . statutory responsibilities" — as *Heckler* hinted but did not expressly hold — then the Court of Appeals certainly erred in concluding that "Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law' and, thus, unreviewable." (App. A-3) The Court of Appeals conclusion is belied by the very language of the statute on which petitioners' APA claim principally relies, 8 U.S.C. § 1103, which says explicitly that the Attorney General "shall have the . . . duty to

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[16]The reasoning of the Court of Appeals is not entirely transparent. The court asserts, without explanation, that "[t]he overall statutory scheme established for immigration demonstrates that Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law' and, thus, unreviewable. *See* 5 U.S.C. § 701(a)." At the end of this otherwise bare assertion, however, the Court of Appeals adds a "*cf.*" cite, not only to *Heckler v. Chaney* generally, but to a particular page of that opinion, 470 U.S. at 837, reiterating that a presumption of nonreviewability applies in actions challenging agency refusals to take enforcement action.

control and guard the boundaries and borders of the United States against the illegal entry of . . . aliens . . . ."

This language need not be construed to establish that the Secretary's enforcement responsibilities have no discretionary element; plainly they do. Nor does it imply that every shortfall — every entry by a single illegal alien — constitutes an actionable failure by the Secretary to perform her duty. But what the language clearly *does* establish is that the Secretary has a statutory "duty" that imposes legal constraints on the scope of her enforcement discretion; it is manifest both from the face of the statute and its legislative history[17] — if a presumption of nonreviewability does not end the analysis — that the Secretary could not, lawfully, abdicate the statutory policy of controlling illegal immigration and guarding the boundaries of the United States against illegal immigrants.

The Court of Appeals erred in holding otherwise, and this Court should grant the writ to correct this error. In addition, it is equally important for this Court to resolve the general question of administrative law, left open by *Heckler* and presented by this case, whether the presumption of non-reviewability applies in cases seeking review of policies of nonenforcement that amount to an abdication of statutory duty. As recognized explicitly by the leading administrative law treatise, 3 Davis & Pierce, *Administrative Law Treatise* § 17.4, p. 142 (3d ed. 1994), "[t]he many circuit court opinions that have applied the rebuttable presumption of unreviewability . . . announced in *Heckler* reflect continuing uncertainty and disagreement with respect to the scope of the presumption and the circumstances required to rebut the presumption." Among

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[17]The legislative history of 8 U.S.C. § 1103 confirms Congress's manifest intent to impose *duties* and to provide judicial review when the actions of the Attorney General or her delegates "transcend [the] limits of authority or abuse [the] discretion reposed in them." 1952 U.S.C.C.A.N. 1654, 1687 § 3.

the specific questions creating persistent confusion is "[w]hen, if ever, can a court" review a challenge to agency policy and provide a remedy "based on a judicial determination that the agency is consciously and systematically refusing to enforce a statute." *Id.* In light of the importance of this question and the confusion and uncertainty surrounding it, this Court should grant the writ of certiorari.

## VI. THIS CASE PRESENTS IMPORTANT QUESTIONS ABOUT THE AVAILABILITY OF JUDICIAL RELIEF NECESSARY TO PRESERVE THE INTEGRITY OF CONSTITUTIONAL FEDERALISM AND PROTECT CONSTITUTIONAL RIGHTS.

From the inception of this case, respondents have protested that there are no judicially manageable standards by which petitioners' claims might be resolved and that the framing of relief would be beyond judicial competence. That this case presents important questions about the necessity and manageability of judicial remedies is a reason for this Court to grant the writ of certiorari, not to deny it.

### A. Fashioning Adequate Relief In This Case Does Not Lie Beyond Judicial Competence.

Petitioners' prayer for relief is carefully framed in the alternative. Petitioners have referred consistently to three forms of remedy: (i) declaratory relief; *and* (ii) an injunction against the continued flouting by respondents of their statutory and constitutional obligations; *or* (iii) equitable restitution of the costs imposed on petitioners by respondents' unlawful policies. Petitioners have never denied that a mandatory injunction might give rise to problems of judicial manageability. But an order to provide equitable restitution does not even arguably intrude on political or foreign policy prerogatives of Congress or the Executive Branch. *Cf. Gilligan v. Morgan*, 413 U.S. 1

(1973) (finding a suit seeking injunctive relief against the Ohio National Guard to be non-justiciable), with *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974) (holding that *Gilligan v. Morgan* did not bar a suit for damages arising from the same events).

As petitioners have maintained throughout, an appropriate and judicially manageable remedy in this case would be for a court to declare the law and to leave to respondents the choice, in the first instance, of how to meet their obligations: either by (i) enforcement actions adequate to satisfy respondents' obligations under the Constitution and laws of the United States to abate the ongoing violation that their policies have caused, or (ii) provision of equitable restitution. Implementation of full relief need not be immediate. *Cf. Powell v. McCormack*, 395 U.S. 486 (1969), specifically so holding. Moreover, the approach taken in *Brown v. Board of Education (II)*, 349 U.S. 294 (1955) illustrates that a remedial order can legitimately anticipate good faith efforts by respondents to craft the most appropriate remedy. Finally, and simply as a matter of equity, dollar-for-dollar restitution of expenditures specifically proved by petitioners would go far in redressing what has been wrongfully exacted from Florida as a sovereign state in our federal system.

### B. A Judicial Remedy Is Not Barred By Sovereign Immunity.

Section 702 of the Administrative Procedure Act expressly waives the sovereign immunity of the United States in suits "seeking relief other than money damages." There can be no doubt that both injunctive and declaratory relief come within this waiver. And *Bowen v. Massachusetts*, 487 U.S. 879 (1988), makes it equally clear that the equitable restitution sought in this case as an alternative remedy, if respondents do not otherwise conform their conduct to satisfy constitutional and statutory requirements, falls within the statutory waiver of sovereign immunity.

As *Bowen* expressly recognized, not all forms of monetary relief constitute "money damages." In particular, *Bowen* established that a suit is not for "money damages" and that the APA waiver of sovereign immunity applies when a plaintiff seeks, not compensation for a past wrong, but "the very thing to which he was entitled." *See* 487 U.S. at 895. Petitioners' claims for monetary relief fall precisely within this definition, since it is merely an alternative to a prospective order directing respondents to end their policy of abdicating constitutional and statutory enforcement duties.[18]

### C. The Constitution Requires An Effective Remedy For Respondents' Constitutional Violations.

Although the APA waiver suffices, this is also a case in which the Constitution itself requires that the barrier of sovereign immunity give way. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court has recognized that the constitutional ideal of the rule of law requires legal remedies adequate to keep the government within the bounds of law.[19] *See* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1786–91 (1991). Sovereign immunity exists under the Constitution, not above or outside it, and at times the Constitution requires

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[18]A remedial analogy is suggested in the law of nuisance. A defendant may be ordered to abate a nuisance by whatever means would be effective to that end; this type of injunctive relief would there, as here, normally be preferred. But if the nuisance is not abated, then the alternative remedy is to require the defendant to absorb all costs attributable to the wrongdoing. *See generally* W. Page Keeton et al., *Prosser and Keeton on The Law of Torts*, 637–43 (5th ed. 1984).

[19]*See* 5 U.S. at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

sovereign immunity to yield. Just last Term, for example, *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547, 549 (1995), expressly held that the Due Process Clause requires effective remedies for the coercive collection of taxes and accordingly mandates the availability of courts to provide those remedies, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." In this case, as in *Reich*, the Constitution mandates that there must be some remedy — whether a judicial order to stem the tide of illegal immigration and the resulting constitutional violation or the alternative of equitable restitution — to vindicate the underlying constitutional right. This Court should grant the writ of certiorari in this case to clarify and reinforce fundamental principles concerning the appropriate role of courts and the necessary role of judicial remedies in the constitutional scheme.

## CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted, and the Court should allow petitioners to file their brief stating comprehensively why the decision of the Eleventh Circuit Court of Appeals should be reversed by this Court.

Respectfully submitted,

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